Page

In re Watts,
190 U.S. 1 (1903) 41
Kinoy v. Mitchell,
S.D.N.Y., Civ. Action No. 5698/70 56
Morissette v. United States,
342 U.S. 246 (1952) 42
Morris v. Master of Crown Office,
[1970] 2 W.L.R. 792 (C.A.) 34
Nye v. United States,
313 U.S. 33 (1941) 59
Offutt v. United States,
232 F. 2d 69 (D.C. Cir.),
cert. den., 351 U.S. 988 (1956) 41
Offutt v. United States,
348 U.S. 11 (1959) 59,63
Panico v. United States,
375 U.S. 29 (1963) 41
People v. Pearson,
240 N.E. 2d 337 (Ill. App., 1968) 63
Schlesinger v. Musmanno,
367 Pa. 476, 81 A. 2d 316 (1951) 63
Screws v. United States,
325 U.S. 91 (1945) 42
Taylor v. Hayes,
___ U.S. ___, 94 S. Ct. 2697 (1974) 45,49,59
United States v. Antonelli,
155 F. 2d 631 (2nd Cir., 1946) 51
United States v. Dellinger,
472 F. 2d 340 (1972),
cert. den., 410 U.S. 970 (1973) 5,7
United States v. Jackson,
426 F. 2d 305 (5th Cir., 1970) 41
United States v. Marshall,
451 F. 2d 372 (9th Cir., 1971) 48
United States v. Russell,
411 U.S. 423 (1973) 63
United States v. Seale,
461 F. 2d 345 (1972) 5,10,20,30
et passim

	Page
United States v. Sopher, 347 F. 2d 415 (7th Cir., 1965)	41
United States v. United States District Court, 407 U.S. 297 (1972)	29, 53
Weiss v. Burr, 484 F. 2d 973 (9th Cir., 1973)	50
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	51, 52

Other Authorities:

Association of the Bar of the City of New York, Special Committee on Courtroom Conduct, Disorder in the Court (1974)	6, 7, 8, 50, 51
Kalven, Harry, Introduction to Contempt (Swallow Press) 1970	9, 10

Constitution:

Fourth Amendment	passim
Fifth Amendment	passim
Sixth Amendment	passim

Statutes:

18 U.S.C., Sec. 401	passim
28 U.S.C., Sec. 1254(1)	passim

Rule:

Rule 42(b), Federal Rules of Criminal Procedure	passim

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. _____

DAVID T. DELLINGER, ABBOTT H. HOFFMAN, JERRY C. RUBIN, and WILLIAM M. KUNSTLER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

David T. Dellinger, Abbott H. Hoffman, Jerry C. Rubin, and William M. Kunstler respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on September 6, 1974. A petition for rehearing en banc or for rehearing was denied on October 16, 1974.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 502 F. 2d 813 and is printed in the Appendix hereto at p. 1a. District Judge Gignoux, sitting by designation as District Court Judge for the remand of this case after earlier convictions of contempt in 1970 had been reversed, rendered three opinions in this matter. One, dated April 4, 1973, is reported at 357 F.

Supp. 949, another, dated December 6, 1973, at 370 F. Supp. 1304, and the third, dated November 6, 1973, is unreported and is printed in the Appendix, infra, p. 31a. The Seventh Circuit's 1972 reversal of Judge Hoffman's earlier convictions is reported at 461 F. 2d 389.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 6, 1974 and the order of that court denying a petition for rehearing en banc or for rehearing was entered on October 16, 1974. On November 4, 1974, Mr. Justice Rehnquist entered an order extending the petitioners' time to file a petition for a writ of certiorari to and including December 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

Questions Presented as to Petitioner Kunstler Alone

1. Whether a lawyer may be convicted of contempt of court because in an argument on a legal question he strongly attacked the unfairness of the judge, where it appears that the argument was made outside the presence of the jury and was spoken in a moderate voice without the use of coarse language, there was no direction by the court to discontinue, and the business of the trial continued calmly without interruption or obstruction at the conclusion of the argument?

2. May an attorney be convicted of contempt for bringing facts to the attention of the jury, allegedly in violation of a court order, when the court by its own intervening action which prompted colloquy before the jury, caused the very facts to be known to the jury, so that the court had itself nullified the order?

3. What is the proper standard of the "intent" required to sustain a conviction under 18 U.S.C., Sec. 401?

4. May a contempt conviction against an attorney be sustained where the order claimed to have been violated by him was in fact not made, where the conviction was of charges not asserted in the notice of charges, and where it appears that the judgment could have been based upon conduct plainly not obstructive?

5. Whether in a case where government prosecution counsel had committed gross misconduct, shown by the record and assumed by the trial judge to be of the same nature as that charged to defense counsel, the government may nevertheless press the prosecution of defense counsel for contempt of court while refusing to move against government counsel on the theory that contempt as a means of controlling trial counsel is a remedy to be employed only against defense counsel?

Questions Presented as to All Petitioners, Including the Petitioner Kunstler

6. Whether the procedure laid down in Alderman v. United States requiring disclosure and an adversary hearing, applies where the government admits unlawful electronic surveillance as to which a defendant has standing, in a prosecution for criminal contempt and where the government fails to make an adequate denial of surveillance?

7. Whether, where the record shows an extraordinary and pervasive pattern of misconduct by the judge and prosecutors directed at defendants and in a subsequent review it is concluded that as

a result of such misconduct there was literally a breakdown of the judicial process at important points, the defendants and counsel may nevertheless be prosecuted for contempt for their response to misconduct throughout the trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are the Fourth, Fifth, and Sixth Amendments to the Constitution, 18 U.S.C., Sec. 401, and Rule 42(b) of the Federal Rules of Criminal Procedure. They are included in the Appendix, infra, p. 108a-112a.

STATEMENT OF THE CASE

A.
Background

The within case is the last remaining remnant of the famed Chicago conspiracy trial. 1/ This petition involves the judgments of conviction of

1/ On February 14 and 15, 1970, at the conclusion of almost five months of trial in the Chicago conspiracy case, and while the jury was still deliberating, Judge Hoffman held seven defendants and two lawyers guilty of 159 counts of contempt. He had earlier, on November 5, 1969, declared a sua sponte mistrial as to Bobby G. Seale and entered a judgment of conviction of contempt against him on 16 counts. Sentences for these convictions on 175 counts against the 10 defendants totalled more than 19 years.

A remand trial on the contempts before another judge was ordered by the United States Court of Appeals for the Seventh Circuit in this case, In re

contempt against petitioners at the conclusion of a remand trial where attorney William M. Kunstler was found guilty on two specifications; Abbott H. Hoffman and Jerry C. Rubin on two specifications each; and David T. Dellinger on seven specifications. Upon the questions submitted to this Court on this petition, the language of only the specifications relating to Mr. Kunstler is directly relevant and they are reproduced at Appendix, pp. 69a, 73a. The language of all the specifications appears as an appendix to Judge Gignoux' last opinion, 370 F. Supp. 1304.

The remand trial before Judge Gignoux of seven defendants and two defense attorneys commenced with 52 specifications. 2/ At the conclusion of

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Dellinger, 461 F. 2d 389 (1972), and the companion contempt case, United States v. Seale, 461 F. 2d 345 (1972). The Court of Appeals also reversed the substantive convictions, ordering disclosure of illegal electronic surveillance and a new trial. United States v. Dellinger, 472 F. 2d 340 (1972), cert. den., 410 U.S. 970 (1973). The government chose not to turn over the illegal electronic surveillance logs and the substantive indictments were dismissed upon the government's motion. The substantive indictment against Mr. Seale was earlier (October 1970) dismissed, also upon the government's motion. Shortly before it pressed the within case for retrial, the government dismissed the contempt charges against Mr. Seale rather than disclose electronic surveillance logs which the Circuit Court had ordered to be revealed.

2/ As pointed out by the Seventh Circuit in its most recent opinion, that Court had earlier stricken 18 specifications as being legally insufficient on their face and the government had before the remand trial unilaterally dismissed 89 of the specifications, 502 F. 2d at 820-21, Appendix, infra, p. 28a.

the government's case, Judge Gignoux granted a judgment of acquittal as to 24 charges and also dismissed two other specifications based upon the lack of specificity of those charges. At the end of the trial, Judge Gignoux entered acquittals as to thirteen additional specifications (370 F. Supp. at 1323). These acquittals resulted in the complete discharge of five of the nine defendants, including attorney Leonard I. Weinglass, and reduction of the number of specifications against the remaining four. Thus, from 10 defendants and 175 citations, the case was reduced to four defendants and 13 citations.

While he entered judgments of conviction, Judge Gignoux concluded that in view of the judicial and prosecutorial misconduct he would impose no "further" sentence upon the three defendants who had been jailed during the period following their conviction by Judge Hoffman and until the Circuit Court granted bail pending appeal. As to Mr. Kunstler, who had not been so jailed, he ordered that "no sentence be imposed " at all (370 F. Supp. at 1324).

These convictions were affirmed by the Court of Appeals (502 F. 2d 813, Appendix, infra, p. 1a) and it is the judgment of that court which is here sought to be reviewed.

The actions of Judge Hoffman at the conclusion of the conspiracy trial in 1970, the number of contempt citations of which he convicted trial participants on the defense side, the length of the prison sentences imposed by him, and the language used by him in his description of the alleged offenses were unprecedented in Anglo-American jurisprudence and produced what is now recognized to have been a wholly unjustified "panic" 3/ in the

3/ See the Preface to the Report of the Special

trial bar and the judiciary. Judicial review, a careful study of the record by a prestigious committee of the Association of the Bar of the City of New York, and finally Judge Gignoux' opinions have produced a wholly different estimate of that trial. Each such review has strengthened the conclusion that the defendants and attorneys in the Chicago trial were victims rather than culprits.

Several months after the Circuit Court reversed the contempt convictions on the ground that Judge Hoffman should not have sat thereon, it reversed the substantive convictions in United States v. Dellinger, 472 F. 2d 340. In that opinion, the court for the first time considered the details of the actions of Judge Hoffman and the prosecutors and set forth in six footnote-packed pages its criticism of their conduct. It concluded that their conduct would have constituted reversible error even if the court had not decided to reverse on other grounds. The court referred to Judge Hoffman's "deprecatory and often antagonistic attitude towards the defense ... evident from the very beginning" and revealed in several hundred remarks which "telegraphed to the jury the judge's contempt for the defense," 472 F. 2d at 386-87, emphasis added; see also, id., fns. 83 and 84.

In May of 1973, the Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York after two years of study filed a monumental report which is undoubtedly the most comprehensive study ever made of disorder in court. The Special Committee, whose appointment

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Committee on Courtroom Conduct of the Association of the Bar of the City of New York, Disorder in the Court, filed in May, 1973, and published in 1974. The Court is respectfully referred to this report in its entirety.

was prompted by this case and one other, 4/ included persons of extraordinary stature at the bar. In what was almost a recounting of experiences at the Chicago trial as detailed in the Circuit Court's opinion, 472 F. 2d at 385-91, the Special Committee emphasized:

> "Ultimately, the problem of courtroom disorder is one that the trial judge must solve. There are some cases in which a judge was the principal agent in creating disorder or in aggravating potentially disruptive conditions." 5/

The Committee enumerated the following classifications of judicial misconduct:

> "1. Arbitrary, biased, or vindictive remarks or rulings...
> 2. Bickering with counsel...
> 3. Interfering with presentation by counsel ..." 6/

Judge Gignoux, after setting out the detailed statements of the Circuit Court in its opinion (472 F. 2d at 388-89) as to improper conduct of the judge and prosecutors, said "the tapes and the eyewitness testimony presented before this court amply support these findings of the Court of Appeals." 370 F. Supp. at 132.

The totality of the evidence led Judge Gignoux to make the following significant finding:

> "[W]ith the exception of the two specifications relating to the 'robe' incident (Hoffman VII and Rubin VI), the contumacious conduct of

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4/ Disorder in the Court, supra, p. 3. The other case was the so-called New York Black Panther case.

5/ Id. at 262.

6/ Id. at 262-63.

the four remaining defendants can, in each instance, reasonably be said to have been in response, albeit an excessive response, to peremptory action by the judge." Ibid.

Another finding of fact by Judge Gignoux should finally dispel the view of this conspiracy trial which was repeatedly projected by Judge Hoffman and government counsel. Judge Gignoux concluded that the government had not succeeded in establishing the existence of a plan by the defendants to destroy the original trial (370 F. Supp. at 1321, fn. 22). 7/ This unproved theory of the government remained with this case up to the bitter end and seems to have been the main reason why the case was pressed for retrial. 8/

7/ The late Professor Harry Kalven, who did an independent review of the Chicago contempt proceedings during the heighth of public controversy over the conduct of the defendants, was the first to point out that the record negated the theory of planned disruption, Kalven, Introduction to Contempt (Swallow Press) 1970, xviii-xix.

8/ The record before Judge Gignoux included the testimony of U.S. Attorney James Thompson, who described a conference in the Department of Justice two days before the commencement of the trial and one week after Elliot Richardson had resigned as Attorney General. At that conference, most of the top aides of the Department of Justice wanted to drop the case and it was clear that that had been the view of Messrs. Richardson and Ruckelshaus. Messrs. Thompson and Henry Petersen were the only ones who pressed for retrial and then acting Attorney General Bork permitted Mr. Thompson to proceed.

Finally, in connection with the origins of the hostility of Judge Hoffman towards Mr. Kunstler, Judge Gignoux made a finding which is of critical importance. It has been generally recognized that the original trial started breaking down as a result of the immediate and rippling effects of the judge's mishandling of the Bobby Seale incident. 9/ The trial record shows that Judge Hoffman sought to solve the problem of the trial's getting out of hand by holding lawyers responsible for his conflict with Mr. Seale. On the first day of trial, he adjudicated four lawyers in contempt and ordered the two of them who were present to jail, 10/ in an effort to pressure Mr. Seale to withdraw his demand that the trial be delayed so that he could have his own lawyer, Charles Garry, represent him. Thereafter, on innumerable occasions, the judge with unrestrained anger insisted that Mr. Kunstler was Mr. Seale's lawyer and blamed him for the conduct of his "client." 11/

9/ The Circuit Court has said that a proper handling of the Seale matter might "well have obviated many of the difficulties that later occurred," United States v. Seale, 461 F. 2d 345, 358 (1972). See also, Kalven, Introduction to Contempt, supra, xxii.

10/ The attorneys would have been in jail over the weekend except that they were released by order of a Circuit Court judge. The following Monday, Judge Hoffman relented and vacated his order. Judge Hoffman's handling of this entire matter was criticized by the Circuit Court in its opinion reversing the substantive convictions, 472 F. 2d at 386, fn. 80.

11/ Throughout the trial, Judge Hoffman repeatedly insisted that Mr. Kunstler was Mr. Seale's lawyer (H. Tr. 4838, 4946; to avoid confusion,

references to the transcript before Judge Hoffman appear as "H. Tr."; references to the transcript before Judge Gignoux appear as "G. Tr."). He read the notice of appearance which Mr. Kunstler had filed (id. at 5009), threatened Mr. Kunstler, "I tell you some day you will have to explain it" (id. at 4725), and raged that Mr. Kunstler could not "quit in the middle of the trial" (id. at 5399) when Mr. Kunstler rightfully refused to cross-examine a government witness on behalf of Mr. Seale, who was not his client. The trial judge noted, "You have been telling me you don't represent him [Mr. Seale] when you do of record" (id. at 4774). "If you were any kind of a lawyer, you would" defend Mr. Seale (id. at 4938). "There is a paper in this record which tells me you are his lawyer and I don't want to have to repeat that again" (id. at 5398). After the prosecutor charged that Mr. Kunstler was "play[ing] fast and loose with the defendant's constitutional rights," Mr. Kunstler protested that such comments made "this jury feel that I am in some way neglecting my duty to Mr. Seale" (id. at 5400-02). The trial judge refused to admonish the prosecutor for this attack before the jury, thereby condoning it. Even after Mr. Seale was mistried, the judge repeatedly referred to Mr. Kunstler's proper refusal to represent Mr. Seale. He characterized the refusal as "very serious" (id. at 7221), insisted that Mr. Seale was still in the case (id. at 14810), and told Mr. Kunstler he was "your client" (id. at 17374). The prosecutor said Mr. Kunstler represented Mr. Seale but would not defend him (id. at 8423), that Mr. Kunstler had refused to ask a question in Mr. Seale's behalf after filing a notice of appearance for him (id. at 13066). There is a whole colloquy by the prosecutor on Mr. Kunstler's representation or lack of representation of Mr. Seale (id. at

Judge Gignoux made an express finding that: "Mr. Kunstler was not the attorney who was advising Mr. Seale or who was responsible for Mr. Seale's conduct." (G. Tr. 4128.)

We turn now to additional facts relevant to the specific questions presented for review.

B.
Facts Specifically Relevant to the Questions Presented for Review to this Court

1. Facts relevant to the alleged contempts of Mr. Kunstler (Questions 1, 2, 3, and 4)

Mr. Kunstler was convicted of two specifications of contempt, designated VI and VII, both as a result of incidents which arose on February 2, 1970, in the fifth month of the trial.

Specification VI [12/]

The background for this specification was well summarized by Judge Gignoux (370 F. Supp. at 1319):

"On Friday, January 30, Mr. Kunstler

13066-71). The prosecutor said about Mr. Kunstler and Mr. Seale, "This is just a ploy, your Honor. This is clearly just a ploy" (id. at 697); "a ploy" (id. at 3132); "Mr. Kunstler gets very confused as to whom he represents... He was when it came to Bobby Seale... Because Mr. Kunstler led him down a primrose path" (id. at 13066-68). The court joined the prosecutor's attack on Mr. Kunstler regarding Mr. Seale (id. at 13066-71.

12/ Appendix, infra, p. 69a.

represented to the court that the defendants had completed the presentation of their 'live' witnesses. He requested and obtained a weekend recess 13/ so that the defense might locate a cameraman necessary to authenticate a film, the admission of which, together with certain documents, would conclude the defense case. On Monday morning, February 2, Mr. Kunstler informed the judge that over the weekend the defendants had learned that the Reverend Ralph Abernathy had returned to the United States from Europe and would be available to testify later that morning. Mr. Kunstler asked to be relieved of his prior commitment in view of this unforeseen development. The government objected, and the judge denied Mr. Kunstler's motion. At this point, Mr. Kunstler made the extended remarks set forth in Kunstler VI."

Dr. Abernathy was a critical defense witness for the reasons contained in Mr. Kunstler's statement, which Judge Hoffman would not allow to be designated as an offer of proof although he allowed it in the record (H. Tr. 19185-88), and as fully developed in the testimony of Messrs. Kunstler and Weinglass before Judge Gignoux (G. Tr. 1483-1503, 2282-85).

In essence, as the Seventh Circuit explained in its opinion on reversal of the substantive convictions, 472 F. 2d at 348-49), the defendants in the

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13/ The only reason Mr. Kunstler was required to seek a recess was that Judge Hoffman had insisted upon adding Saturday sessions during the defense case. There were no weekend sessions during the government's presentation of its case. (Footnote not in court's opinion.)

earlier trial had been charged with planning a riot in Chicago through the Mobilization Committee Against the War in Vietnam and the Youth International Party. Dr. Abernathy was co-chairman of the Mobilization (472 F. 2d at 349). Had he been permitted to testify, he would have established that he had approved all the major plans of the organization. But more specifically, the government had presented the testimony of Deputy Superintendent of Police Rochford to the effect that Dr. Abernathy's "Poor People's Mule Train" had been led out of the demonstration area at the request of its leader, made to the witness Rochford because the people in the mule train feared violence from the demonstrators. Mr. Kunstler contended that the facts were the opposite of Mr. Rochford's testimony and that Dr. Abernathy was prepared to testify that he wanted his mule train to remain because he did not believe that the demonstrators were in any way violent, but it was Rochford who insisted that he leave (G. Tr. 2283-84). This particular incident at Michigan Avenue and Balbo Street, as explained in the Circuit Court's opinion on the substantive case (472 F. 2d at 353), was the major "confrontation and battle" relied upon by the government in support of its contentions that the defendants had conspired to violate the anti-riot statute.

Mr. Kunstler further testified before Judge Gignoux that the defendants for at least 10 days had sought to locate Dr. Abernathy to obtain him as a defense witness in the trial before Judge Hoffman (G. Tr. 2282). 14/

14/ As explained by Mr. Weinglass, the ruling of Judge Hoffman on January 24, 1970, refusing to permit defendant Davis to testify as to what Dr. Abernathy said at the public meeting of August 29, 1968, made it absolutely critical that Dr. Abernathy testify personally (G. Tr. 1485).

This was the posture on the morning of February 2, 1970, when Mr. Kunstler advised the court of a new development, namely, that the defendants had located Dr. Abernathy, who had just returned from Europe, and asked for leave to put Dr. Abernathy on the stand despite his representation to the court on the preceding Friday (H. Tr. 19102). He explained that Dr. Abernathy was "arriving at this moment at O'Hare Airport" (id. at 19104) and assured the court that "his testimony is not long and it would be the last witness we would offer" (id. at 19105).

The government objected to Dr. Abernathy's being permitted to testify and there was a heated debate which continued for 11 pages. The debate reflected both the strain of nearly five months of a grueling series of trial confrontations and the extraordinary frustrations of the defendants at being denied a critical witness by a ruling which was certainly one of the most egregious of Judge Hoffman's many acts of unfairness.

Towards the end there occurred the argument in the record which constitutes the first of the two specifications of contempt of which Mr. Kunstler was convicted.

As part of his argument before Judge Hoffman, Mr. Kunstler referred to the court's ruling as "outrageous" and he contended that the court had previously, by the exclusion of Ramsey Clark's testimony, "violated every principle of fair play." He contended that the court was relying on the "technicality" of a promise to rest which had been made in "perfect good faith," to exclude testimony. He argued that Dr. Abernathy had relevant testimony and charged "that doesn't mean much in this court." He said that Judge Hoffman was "doing a disservice to the law" in his ruling that the Reverend Abernathy could not take the stand. Towards the conclusion of his argument he charged that

"there is no meaning in this court, and there is no law in this court ... and these men are going to jail by virtue of a legal lynching." He concluded with a comment, "Your Honor is wholly responsible for that, and if this is what your career is going to end on, if this is what your pride is going to be built on, I can only say to your Honor, 'Good luck to you'." (H. Tr. 19108-112.)

The transcript and the tape 15/ reveal that --

a) The jury was not present during the entire colloquy;

b) At no time did Mr. Kunstler raise his voice beyond the normal level of a lawyer making an argument (G. Tr. 2292);

c) The argument was indeed, as testified by Mr. Kunstler, "forceful and vigorous" (id. at 2291); "I argued I guess as vigorously as I have ever argued in my life because of the great importance of Dr. Abernathy" (id. at 2292); however strong the argument, the language was not coarse;

d) The argument was sufficiently lawyer-like to be persuasive. While it did not at first bring about a change in Judge Hoffman's ruling, it caused the government to realize the error of excluding Dr. Abernathy's testimony, as a result of which the government withdrew its objections (id. at 2292-93; H. Tr. 19138) if Dr. Abernathy were in the courtroom;

e) During the argument, Mr. Kunstler was never directed by Judge Hoffman to stop talking and there was no reprimand by the judge;

f) Directly after the argument, with no

15/ By good fortune, the court reporters had made a tape recording of the original trial which had remained extant. Selected portions were played before Judge Gignoux and were part of the record on appeal.

indication of tensions, the court and counsel for 25 pages (H. Tr. 19113-37) handled housekeeping functions relating to the closing of the defendants' case, e.g., the marking of exhibits, rulings on motions to quash subpoenas, etc.

Specification VII [16]

The only other specification against Mr. Kunstler arises out of a further development in connection with the foregoing incident and on the same day. It will be noted that Judge Gignoux in his appendix describes the specification as having two separate parts. This is not the way Judge Hoffman charged it and the government pressed it (461 F. 2d at 449-52).

Following Mr. Kunstler's argument and Judge Hoffman's refusal to permit Dr. Abernathy to take the stand, there occurred the following colloquy among assistant prosecutor Schultz, the court, and Mr. Kunstler:

"MR. SCHULTZ: Your Honor, may the defendants and their counsel then not make any reference in front of this jury that they wanted Dr. Abernathy to testify?

MR. KUNSTLER: No, no.

THE COURT: I order you not to make such a statement." (H. Tr. 19140.)

There then followed a colloquy in which Mr. Kunstler in part stated that he would not abide by such an order and in part pleaded with the judge to reconsider his ruling not permitting Dr. Abernathy to take the stand. He emphasized, "He will be here in five minutes." (H. Tr. 19141-42.) This concludes what Judge Gignoux designates as Part I of Specification VII.

At this point the jury was brought in and there

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16 / Appendix, infra, p.73a.

appears a further colloquy in the transcript of the proceedings before Judge Hoffman which incomprehensibly does not appear either in the specification as drawn up by Judge Hoffman 17/, nor in the revised specifications prepared by the government, nor, surprisingly, in the appendix prepared by Judge Gignoux.

This colloquy, which is decisive in the evaluation of this charge, was as follows:

> "THE COURT [addressing the jury]: I must inform you that I have called on the defendants to produce whatever witness they had, and they had none ready to proceed, and they did not indicate that they would rest. Hence, I entered an order indicating that the defendants were not ready to proceed as they indicated on Friday they would be, and I let the record show in your presence that the defendants have rested. The word 'rested' in law means they have no further evidence to present.
>
> MR. KUNSTLER: We object to that, your Honor. Dr. Ralph David Abernathy is on his way from the airport to this courtroom. We informed your Honor and requested a few moments. He has just arrived back in the country. We want the jury to understand we do not rest. We are prepared to go ahead. We ask merely a few minutes' recess to bring Dr. Abernathy to the stand." (H. Tr. 19143-44.)

At the time that he made the foregoing statement, Mr. Kunstler was in no way admonished by the court, and at no time has that statement been charged with having been a matter of contempt (G. Tr. 2310-11). Judge Hoffman having made his

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17/ In Judge Hoffman's enumeration, this is specification XXI, 461 F. 2d at 449.

statement to the jury, Mr. Kunstler obviously had a duty to his clients to reply and correct the judge's misstatement to the jury.

Immediately thereafter, the government made the following statement which did not even suggest a violation of an order but did include a direct communication to the jury challenging the truthfulness of the defense representations to the jury:

> "MR. SCHULTZ: The Government's position is if he were here, we wouldn't object to their putting him on, even though they said they had no more witnesses. We want to proceed with the trial. They don't know when he is going to be here. They have said he was going to be here for the last hour." (H. Tr. 19144.)

At that point in the proceedings, as a result of a series of events set in motion by the judge, the jury knew the facts concerning Dr. Abernathy.

Ten pages and 16 minutes later, Dr. Abernathy arrived and Mr. Kunstler had his colloquy with the court which is the basis for what Judge Gignoux calls Part II of Specification VII. While the witness Robert Lynskey was on the stand, Mr. Kunstler moved that Judge Hoffman reconsider his ruling that Dr. Abernathy would not be permitted to testify. Judge Hoffman refused to entertain this motion and, referring to Dr. Abernathy, three times stated, "Let him sit down." Mr. Kunstler then asked the judge to "permit an application for Doctor Abernathy to testify after the witness has testified." Judge Hoffman refused to respond to the request and Dr. Abernathy left the courtroom after some further colloquy between Mr. Kunstler and the judge.

In a lawyer-like manner, Mr. Kunstler made one last effort as the luncheon recess was declared, and while Dr. Abernathy was still available, to have Judge Hoffman reconsider his ruling. He was repulsed with a curt, "There has been a

decision." (H. Tr. 19180.) After lunch, Dr. Abernathy having already left town (id. at 19184), and because the government so requested (id. at 19192). Judge Hoffman indicated to counsel that he would permit Dr. Abernathy to testify the following morning (id. at 19234). Mr. Kunstler advised the court he would attempt to produce Dr. Abernathy then (id. at 19235), but Dr. Abernathy was not available (id. at 19285).

Close inspection of the language of Judge Hoffman's charge and the findings of Judge Gignoux shows important differences. It will be observed that Judge Hoffman in his specification (which was never amended though there was ample power to do so, United States v. Seale, 461 F. 2d 372) charged that Mr. Kunstler violated an order to "not mention the name of Reverend Abernathy in front of the jury." The record shows that no such order was made! It will also be noted that Judge Gignoux stated that Mr. Kunstler "flagrantly and defiantly violated the court's order not to renew his motion in the presence of the jury." The record shows that no such order was made and no such order was even charged. It will also be observed that there are two distinct parts of this specification. There is no clear indication in the judgment of conviction as to whether that judgment is based on both parts.

2. Facts relating to discriminatory prosecution of Mr. Kunstler (Question 5)

In arguing the motion to dismiss because this was a selective and discriminatory prosecution, counsel for the defense demonstrated that the charges of contempt against defense counsel described misconduct of which government counsel

were repeatedly guilty, and Judge Gignoux recognized this when he stated that he would accept arguendo "that the government counsel in this case were guilty of violations ... that you have listed." 18/ (G. Tr. 624.)

18/ Although Judge Gignoux assumed arguendo that government counsel were guilty of "contumacious misconduct," we shall give a few brief references to show that that assumption was massively supported by the record and to establish the force of defendants' assertions.

a) Violation of orders of Judge Hoffman. This is the claimed basis of the conviction of Mr. Kunstler on Specification VII.

On September 29, 1973, Judge Hoffman expressly directed "that the gentlemen of the government should not make derogatory statements to the lawyers for the defendants. If you feel that any conduct of the lawyers for the defense needs admonition or discipline from the court, please move the court for the exclusion of the jury, then I will be glad to hear you." (H. Tr. 913.) On the following page Judge Hoffman later reiterated that order (id. at 914).

The record of this case shows consistent and deliberate violation of that order by counsel for the government. The Seventh Circuit recognized the impropriety of the prosecutors' comments and gave a few examples of such conduct in its opinion reversing the substantive case, 472 F. 2d at 389, fn. 87. Our point here is not merely that the conduct was improper but that it was also in direct violation of Judge Hoffman's order.

For example, government counsel said, in the presence of the jury: "I withdraw my objection to the trick question of Mr. Kunstler" (H. Tr.

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921); [Kunstler's] "trick question" (id. at 1034); "I think ten years of education [for defense counsel] is the only answer to that" (id. at 1039); [re defense counsel] "It distorts and it is a deliberate attempt to distort..." (id. at 1622); "Mr. Kunstler is intentionally generating objections from the prosecution and with his claque back in the courtroom giggling and groaning..." (id. at 1655); "Mr. Weinglass knows that is improper" (id. at 1811); "Maybe I can suggest to Mr. Weinglass how to do that" (id. at 1835); prosecutor asks the court "to order Mr. Weinglass not to intentionally ask questions that he knows are not proper in law" (id. at 1836); "If Mr. Weinglass would elicit answers instead of just concentrating on making speeches..." (id. at 1898); [as to defense questions] "We will be here until spr ..." [to a sequestered jury!] (id. at 2254); "I don't think Mr. Kunstler does anything voluntarily" (id. at 2981); [re defense question] "...but just to make it up out of whole cloth" (id. at 3300); [Kunstler's argument] "comes out of left field"(id. at 3604); "Mr. Weinglass just cannot confine himself to the rules of the court" (id. at 3731); "His [defense counsel's] representation which predicated his asking the questions was a false representation" (id. at 3918); "Mr. Weinglass has stood before this Court and made a representation which is false" (id. at 3920); "Your Honor, if Mr. Kunstler would sit down and listen he might learn something" (id. at 4319); [re defense question] "It's silly" (id. at 4498); [re defense question] "He knows that's false" (id. at 4503); [re defense question] "here we go back on the television ... that was such a silly question" (id. at 4560); "Mr. Kunstler wants to play fast and loose with the defendant's [Seale's] constitutional rights" (id. at 5401); "Mr. Kunstler

is laughing so he can influence the jury with the impression that this is absurd. That is why he is laughing aloud..." (id. at 6288); "I am implying Mr. Kunstler's motives which are patent" (id. at 6290); [after a proper question by Kunstler to which objection was sustained] "I think Mr. Kunstler well knows it. He is trying to summarize the testimony taking little piece here and there, leaving out all of the rest, which he hasn't touched on, and trying to summarize two months of meetings in one question which can't be done" (id. at 7149); "Mr. Kunstler can't remember his own questions and answers" (id. at 7151); "Mr. Kunstler doesn't hear very well" (id. at 7154); "The question is so bad, Mr. Weinglass had trouble with the last word. He almost swallowed it because he knew an objection was coming" (id. at 7169); "Mr. Weinglass is improperly stating the testimony ... misstating the evidence" (id. at 7177); "Mr. Weinglass is really oppressed in this courtroom. Every time he opens his mouth it is, 'Am I precluded from this? Am I precluded from that?'" (id. at 7230); "I can't believe a lawyer in a Federal District Court -- Mr. Weinglass has stated to this court that he has been practicing for ten years -- would in front of the jury make a statement like that. That is absolutely undignified and unprofessional, that he stand there and make a statement like that" (id. at 7348); "I make these observations in requesting the Court to be assured from Mr. Weinglass that these are proper impeachment foundation questions and not questions made up out of whole cloth" (id. at 7357); "We are never going to complete this if Mr. Kunstler repeats everything" (id. at 8120); "Mr. Kunstler isn't trying to elicit answers; he is trying to just be smart" (id. at 8217); "I will make the objection loud this time so

Mr. Weinglass hears it..." (id. at 8276); "he [Kunstler] characterized it in his own inimitable way" (id. at 8618); [re defense question] "... I mean, this is idiotic..." (id. at 8747); "In typical fashion Mr. Kunstler is misstating the testimony" (id. at 9271); "He [Kunstler] is misstating what he is referring to" (id. at 9467); [re prosecution objection which was sustained] "can be based on Mr. Kunstler making facts up out of whole cloth..." (id. at 9569); [calls Kunstler] "that man"; [when Kunstler insists on use of his name] "What I think of calling you I won't say before ladies" (id. at 9888); [re Kunstler statement] "This is just a show-boat" (id. at 10942); "I have never heard a lawyer present a legal argument the way Mr. Weinglass does. He says, 'You haven't let me do this, you haven't let me do that,' as though he is really being oppressed. If Mr. Weinglass would follow the rules of evidence instead of trying to alter them and then say, 'Oh, but you are not letting me do this' . . . if he would follow the rules of evidence, the probative rules, instead of asking the silly questions, trying to make it appear that poor Mr. Weinglass is being taken advantage of, we could proceed with this trial" (id. at 11047); [defense attorney can't] "say just whatever comes to mind" (id. at 11149); "... and Mr. Kunstler has so very carefully told all his witnesses say what you please and when you are cut off say your Honor, this is the first time" (id. at 11291); "Mr. Kunstler very conveniently has deaf ears when his clients are acting up in court and he is the only one who doesn't hear it, and when there is evidence from the witness stand which is not to his liking" (id. at 11547); "... I am answering Mr. Kunstler's objection, which is just as I said, he doesn't hear the evidence"(id. at 11552); "Mr. Weinglass should not

play along. He should ask questions the way a lawyer should ask questions" (id. at 12404); "Mr. Weinglass, knowing the questions are not proper is asking anything to get the witness to give answers to which objections have been made" (id. at 12417); "Mr. Weinglass' conduct is not professional" (id. at 12480); "he [Weinglass] asks absurd questions" (id. at 12487); "Mr. Kunstler keeps hopping up with a few little jabs here and there and that has nothing to do with this proceeding. He thinks he is an entertainer of some sort" (id. at 12488); "That [Weinglass's question] is a grossly improper question" (id. at 12503); "If Mr. Weinglass is going to proceed, let him proceed with it according to the rules of evidence which he is not doing. Either he doesn't know how or he doesn't care about it, but he is not doing it and that is the reason this examination has gone on for over a day and a half, a bunch of hearsay, miscellaneous thoughts, retraction, going back and forth over testimony, because he doesn't know how to examine a witness" (id. at 12906); "... Mr. Kunstler gets very confused as to whom he represents... He was when it came to Bobby Seale, your Honor.. Because Mr. Kunstler led him down a primrose path" (id. at 13066-68).

b) Bringing improper matters before the jury. This appears to be another basis for the conviction of Mr. Kunstler on Specification VII. The record is again replete with innumerable cases of the prosecution bringing improper matters before the jury.

The prosecutor in the presence of the jury said that defendants Davis and Hoffman, both of whom

had testified, had perjured themselves on the stand (H. Tr. 19670). The assistant prosecutor gave his opinion in the presence of the jury on a matter that went to the heart of the charges against the defendants. He told the court in the presence of the jury that he had succumbed to the harassment of appellant Rubin and of the defendants "that started four months ago, a procedure and technique they have been using on authorities and policemen all of their lives" (id. at 14736).

The prosecution also made improper comments in the presence of the jury to defense witnesses, implying that they had been coached and were saying what defense counsel told them to say (id. at 11291, 10623-24). The prosecutor said in front of the jury that the witness then on the stand had "testified that he ... had arrested a 6-foot-four-inch man" (id. at 7739); there was no such testimony.

The assistant prosecutor on cross-examination of defense witness Ochs asked an improper question about the Pentagon incident (id. at 10595). He made a speech to the jury saying that the Pentagon incident was not as the witness had testified but "breaking through ... the lines of the United States Army, and penetrating into the Pentagon" (id. at 10597). He continued, "I think the Pentagon incident makes Mr. Kunstler nervous" (id. at 10601). Although there had been no testimony to that effect, he told the jury, "They broke through the military lines which were guarding the Pentagon, the lines were lined up in front of the Pentagon and they broke through" (id. at 10603).

Mid-trial, the assistant prosecutor declaimed before the jury for nine pages about what the evidence had shown (id. at 11546-54). The assistant prosecutor made a long, long speech about how

Judge Gignoux held that:

"Even assuming arguendo that these statements and remarks [by government counsel] constituted contumacious misconduct, this Court can find no satisfactory showing by defendants that the United States on behalf of the court, has pursued the present prosecution for a discriminatory and unconstitutional purpose."

In re Dellinger, unreported, November 6, 1973, Appendix, infra, p. 37a.

The only testimony in the record with respect to why the government did not pursue contempt action against the prosecutors was in the testimony at the remand trial of U.S. Attorney Thompson, which was directly at odds with the state of the record. 19/

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policemen were acquitted in a different trial involving the episode defense witness Sequeira was being asked about (id. at 12011-28).

c) Insults and attacks. While we believe that, short of obstruction (see our argument, infra, p. 34), insults and attacks are not contempt, it certainly cannot be said that insults have a different quality when directed at defense attorneys rather than at a judge. The record of insulting attacks by the prosecution against defense attorneys is massive and infected the entire trial. The examples given under (a), supra, are equally applicable to this category.

19/ Mr. Thompson admitted that he never took "any action" to press contempt charges against the prosecutors in the case (G. Tr. 2492-93) because "the circuit court ruled explicitly, as I recall, that their behavior did not constitute contempt of court" (id. at 2509). But he was unable to point out where the Circuit Court had so ruled, either then or "tomorrow morning" as suggested by the trial judge (id. at 2511). Inspection of the opinion to which Mr. Thompson refers shows

The contention of the government on appeal was that since misconduct by prosecutors "can be deterred by appellate reversals," the prosecution of the contumacious prosecutors for contempt was unnecessary, 20/ an admission by the government that it applies different standards to government counsel than to defense counsel in determining whether to press a criminal charge.

3. Facts relevant to the electronic surveillance issue (Question 6)

Subsequent to the remand of the contempt prosecution, the defendants made an extensive pretrial motion in which they sought the disclosure of electronic surveillance in accordance with principles laid down in Alderman v. United States, 394 U.S. 165 (1969). They also sought an evidentiary hearing with respect to the impact of such surveillance. See motion filed December 27, 1972, Appendix, infra, p. 89a.

The motion sought the disclosure of all electronic surveillance with respect to defendants, their counsel, and assistants to counsel. The defendants contended that they were entitled to a disclosure of unlawful electronic surveillance which occurred during the conspiracy trial, as well as such as might have occurred prior to the conspiracy trial.

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there is no such ruling by the Circuit Court, "explicit" (Mr. Thompson's word) or implicit.

20/ The formulation by the government was as follows:

"... misconduct by prosecutors can be deterred by appellate reversals. Thus different deterrence considerations apply to a decision to proceed on contempt charges." (Government's brief before the Circuit Court, p. 16.)

While under Alderman they were not required to demonstrate relevance or even arguable relevance, defendants nevertheless pointed out to Judge Gignoux the obvious relevance of electronic surveillance in that --

a) It was a fundamental thesis of the government in support of its claim of "intent" in the contempt charges, that the defendants had mapped a strategy of trial disruption long before the trial, while the defendants contended their intent was to have a wholly peaceful and proper trial.

b) It was the defendants' contention that much of the difficulty in the trial before Judge Hoffman arose out of a conscious and deliberate program by the prosecutors to paint a picture of disruption at the trial and to provoke it if necessary and that, in connection with such a program by the prosecution, information obtained by electronic surveillance before the trial started and during its continuance provided the fruits from which the government molded its strategic approaches.

The factual record with respect to the existence of electronic surveillance in this case was:

1) The government admitted that there had been electronic surveillance of the defendants before the conspiracy trial. 21/

21/ This was the case in which former Attorney General Mitchell first publicly enunciated the doctrine that the President had the power on a claim of national security to conduct warrantless electronic surveillance, and in connection with that assertion admitted the existence of the electronic surveillance against the defendants. This assertion was of course rejected by this Court in United States v. United States District Court, 407 U.S. 297 (1972).

The admission of electronic surveillance was one of the grounds upon which both the substantive

2) The government failed to deny unequivocally the existence of electronic surveillance during the conspiracy trial, of or directed against the defendants, their attorneys, and the legal staff. The government presented a memorandum of Mr. Mitchell dated July 14, 1969, which, in anticipation of the pending conspiracy trial against appellants, directed:

"The telephone surveillance which I have authorized should continue under current directives. However ... [any special agent or special employee] is to immediately cease monitoring, both in person and by electronic recording, any conversation as soon as he becomes aware that one of the parties to the conversation is a defendant in a pending federal criminal case or an attorney of such defendant." (G. Tr. 4511; emphasis supplied.)

Additionally, Mr. Calhoun, an attorney with the Department of Justice, furnished an affidavit which states:

"As you were previously informed, a search was conducted to determine, inter alia, whether any of the defendants in this case (including Messrs. Weinglass and Kunstler) were overheard during the period the defendants were being tried for the substantive offenses. I have conducted a review of those records, and that review reveals that the procedures outlined in the Attorney General's

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case, 472 F. 2d 340, and the Seale case, 461 F. 2d 345, were reversed on appeals by the Seventh Circuit. In both cases, the government was directed to make disclosure if it sought retrials. In both cases, the government withdrew the prosecutions and made no disclosures.

memorandum were followed as the Attorney General instructed."

The trial court denied defendants the opportunity to explore in an adversarial context the background, meaning, and import of Mr. Calhoun's affidavit notwithstanding two major facial omissions:

1) That both the Mitchell memorandum and the Calhoun affidavit carefully omit any reference to the overhearing of legal staff other than attorneys of record; 22/ and

2) That both the memorandum and the affidavit failed to preclude the very distinct possibility that monitoring -- either in person or by electronic recording -- did in fact occur at least until the agent became aware of the identities of the parties to the conversation.

In addition, as a result of disclosures occurring after close of the trial in the civil action, Dellinger v. Mitchell, Civ. Action No. 1768-69, D.D.C., the petitioners were able to directly challenge the adequacy and accuracy of Mr. Calhoun's statement by submitting to the Court of Appeals in camera documents which demonstrated that on at least one occasion FBI Director Hoover expressed concern that a discussion of defense strategy had been monitored and improperly handled, 23/ and also that

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22/ The demand for disclosure included a list of more than 20 persons who worked on the staff, including dates of employment (Appendix, infra, p.106a. There was no question as to defendants' standing with respect to overhearings of their legal staff and it should be noted that the critical overhearing in the Seale case did not involve either Mr. Seale or his attorney but rather an intermediary. 461 F. 2d at 364.

23/ Appellants' [plaintiffs in the civil action] in camera exhibit, Memorandum, F.B.I. Director to SACS, San Francisco and Chicago, dated November 17, 1969.

one of the purposes of the surveillance was to make personality assessments and to monitor personal circumstances of the defendants. 24/

Judge Gignoux in essence ruled that trial of the contempt was sui generis to the point that the principles of Alderman requiring pretrial disclosure of electronic surveillance are inapplicable even though standing and unlawfulness are established. He denied both disclosure and an evidentiary hearing to determine what actually occurred in practice under the Mitchell memorandum and whether there had in fact been any unlawful electronic surveillance as to which they had standing (G. Tr. 3641), and he did not even require a government response re overhearing of defense staff.

Having decided that Alderman was inapplicable to the proceeding, Judge Gignoux accepted in camera submissions of electronic surveillance material and made an ex parte determination that the overhearings were not relevant. The Court of Appeals in its review of the case also reviewed the in camera submissions ex parte and concluded that the electronic surveillance was irrelevant.

In its opinion, the Court of Appeals made a serious factual error. The court said:

> "The Government turned over to Judge Gignoux for his in camera inspection logs of all overhearings requested by defendants' disclosure motion."

The foregoing is not in accord with the record; the government never turned over to Judge Gignoux overhearings of persons on the legal staff of the defendants, nor those which could have occurred even had the Mitchell memorandum been followed.

24/ Memoranda, F.B.I. Director Hoover to Mr. Mitchell, July 23 and December 2, 1969, and June 12, 1970.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION WHICH HAS BEEN DECIDED BY THE SEVENTH CIRCUIT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND THREATENS SERIOUS MISAPPREHENSION THROUGHOUT THE FEDERAL JUDICIAL SYSTEM THAT THE CONTEMPT PROCESS MAY BE USED FOR PURPOSES OTHER THAN THE PREVENTION OF "ACTUAL OBSTRUCTION OF JUSTICE" AND SPECIFICALLY THAT IT MAY BE USED TO PUNISH VIGOROUS DEFENSE COUNSEL IN A MANNER WHICH WOULD UNDERMINE THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT.

This point concerns the two specifications relating to Mr. Kunstler, and presents serious questions as to permissible lawyer conduct.

A.
Kunstler Specification VI

In a consistent line of cases, this Court has set forth a series of fundamental principles governing the use of the contempt process. They are:

1. The essence of contempt is "actual obstruction of justice," In re McConnell, 370 U.S. 230, 236 (1961), a principle which was rooted in the history of the adoption of 18 U.S.C., Sec. 401, following the impeachment trial of Judge Peck. See, Bridges v. California, 314 U.S. 252, 266 (1941).

2. As applied to lawyers, that principle has

meant that "the arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in his performance of judicial duty," McConnell, 370 U.S. at 236.

3. Absent actual obstruction, attorneys may not be charged with contempt because their statements before the court include "insults," Holt v. Virginia, 381 U.S. 131, 137 (1965), or are "disrespectful," In re Little, 404 U.S. 553, 554 (1972), 25/ because "the law of contempt is not made for the protection of judges who may be sensitive to the whims of public opinion. Judges are supposed to be men of fortitutde, able to thrive in a hardy climate," Craig v. Harney, 331 U.S. 367, 376 (1947), and "trial courts ... must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice," Brown v. United States, 356 U.S. 148, 153 (1958).

These principles as standards governing the conduct of lawyers are designed "to preserve the kind of trials that our system envisages" and "an independent judiciary and a vigorous independent bar ... both indispensable parts of our system of justice," In re McConnell, supra, 370 U.S. at 236.

But however clearly this Court may have spoken on this issue, there is constant backsliding. Many judges still think that the contempt power is a weapon available to protect their sensibilities 26/

25/ We are not here concerned with coarse language; see the Chief Justice and Mr. Justice Rehnquest concurring in In re Little, 404 U.S. at 556.

26/ Lord Justice Salmon has identified a semantic reason for his misconception. In the recent case of Morris v. Master of Crown Office [1970] 2 W.L.R. 792 (C.A.), he said:

and, unless corrected by this Court, the opinion of the Seventh Circuit will go a long way to encourage that way of thinking.

Specification VI of Mr. Kunstler was based on a legal argument, outside the presence of the jury, during which there was no reprimand from Judge Hoffman, nor even a direction that Mr. Kunstler stop talking, and which involved no coarse language. The Seventh Circuit sought to overcome the requirement of actual obstruction of justice by claiming that Mr. Kunstler's argument constituted a "diatribe" and indeed a "vicious personal attack on the judge which could only have served to vent his spleen," 502 F. 2d at 815. But this is plainly a substitution of rhetorical language for a finding of "actual obstruction" of the trial.

How then does the Seventh Circuit seek to overcome the fact that there is obviously a missing element -- actual obstruction -- without which there can be no contempt? The manner in which the Circuit Court approaches this issue makes its decision particularly dangerous from a precedential point of view.

In three sentences in its opinion the Circuit Court tries to construct obstruction (App. 5a-6a):

a) "Because of the extreme nature of the attack on the trial judge, the remarks

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"... The archaic description of these proceedings as 'contempt of court' is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of judges and to protect them from insult. Nothing could be further from the truth. No such protection is needed. The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented." Id. at 801.

of counsel created an imminent prejudice to a fair and dispassionate proceeding, thus constituting an actual and material obstruction of the judicial process." Ibid.

But the record directly contradicts the foregoing. The fact finding body, the jury, was not present, and the record plainly shows that the trial proceeded without the slightest deviation from normal business.

b) "Moreover, as the trial judge found, Kunstler's conduct 'resulted in an entirely unnecessary and not insignificant delay and disruption of the proceedings' (370 F. Supp. at 1320), reinforcing his holding that there was an actual and material obstruction of the administration of justice." Ibid.

Mr. Kunstler was addressing the court. It is obvious that had he employed other words not considered as being an attack on the court, his argument would not have been claimed to have caused "a delay and disruption of the proceedings." Thus it is self-evident that it is the choice of words, specifically the "vehemence of the language used," not the duration of the expression, on which the Seventh Circuit relies. This was especially true as Mr. Kunstler was never directed to cease speaking. This Court has expressly forbidden a contempt conviction based on "vehemence" of language, Craig, supra.

c) "Before concluding with respect to this specification, it should be noted that at their close, Kunstler's remarks predictably precipitated shouts of 'right on' and applause, again satisfying obstruction standards. 461 F. 2d at 399-400." (502 F. 2d at 815-16.)

But elementary fairness would require lawyers not be held responsible for the reaction of spectators unless there is proof of attribution. Even the Seventh Circuit recognized that in an earlier case,

In re Oliver, 470 F. 2d 10, 13 (1972). Lawyers may not be held in contempt because some impromptu eloquence evoked applause. There is not a shred of evidence to suggest that Mr. Kunstler planned the audience reaction or was in any way (except by the fact of his presentation) responsible for it.

Judge Fairchild's concurring opinion is a candid admission that there was no obstruction but that "we are willing to presume or infer the existence of obstruction where the conduct appears to us extremely inappropriate, indeed outrageous, and shocking" (502 F. 2d at 821, Appendix, p. 30a).

This statement by Judge Fairchild, which is compelled by the record, is an admission that the Circuit Court has effectively ignored the basic requirement of contempt, namely, that demonstrated actual obstruction of justice is the cornerstone thereof. In other words, the Seventh Circuit, contrary to the holdings of this Court and the history of 18 U.S.C., Sec. 401, including the impeachment of Judge Peck which led to the statute, has made criminal non-obstructive language of a lawyer which is considered excessively critical of a judge. Since misapplication of this rule of law so vitally threatens a "vigorous independent bar ... indispensable ... [to] our system of justice," In re McConnell, 370 U.S. at 236, review of the Circuit Court's determination is necessary. Particularly is this so because of the notoriety of this case and the likelihood that the opinion of the Seventh Circuit would have more than normal impact as a precedent.

B.

Kunstler Specification VII

The issue of "obstruction" in respect to Specification VII comes up in a different but equally critical manner.

Judge Gignoux divided this specification into two parts. His judgment of conviction does not make clear what the basis is upon which the conviction rests (discussed infra, Point III).

But Part I of Specification VII is a carbon copy of the facts in the McConnell case, i.e., a lawyer's stated intention to violate a court's order. In McConnell, the language was "we propose to do so unless some bailiff stops us," 370 U.S. at 235. Here the language was of the same genre.

McConnell reversed a conviction of contempt on the basis of the foregoing threat on the ground that it did not constitute obstruction; in this case, Mr. Kunstler was convicted thereon as to Part I of the specification.

Beyond that, the failure of every lower court which has dealt with this case -- Judge Hoffman, Judge Gignoux, and the Seventh Circuit -- to take serious account of 12 pages of transcript 27/ is a remarkable indication that the conviction cannot stand on the basis of a full inspection of the record and its impact on the issue of obstruction.

Lawyers of course are required to comply with a court order not to bring certain matters before a

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27/ We have set forth in the Appendix hereto the full text of the two specifications of contempt upon which these convictions are based.

With respect to Specification VII, however, we have gone further. In the version prepared by both Judge Hoffman and Judge Gignoux, 12 pages of transcript are simply omitted. As we have set it forth in the Appendix hereto, those 12 pages appear as they were in the original trial record before Judge Hoffman. The included material begins at H. Tr.19142 and terminates at H. Tr. 19154, Appendix, infra, pp. 75a-84a.

jury. But this is an issue that occurs probably in every jury trial and trial lawyers are expected also to be acutely aware of the changing nature of a situation in the courtroom. Contempt requires not only obstruction but also intent (the question as to the proper standard of "intent" is discussed infra, Point II) and a lawyer cannot be said by any standard to have intended to violate a court's order to keep matters from a jury when he does no more than take account of the intervening facts which brought the matter to the jury's attention and "moves" before the court that it reconsider its ruling. This is simply not the kind of "obstruction" which this Court envisaged in McConnell.

The Seventh Circuit's dismissal of defense contentions on that score as "frivolous" and its characterization of Mr. Kunstler's contention as being that he "got away" with violating the court order once, is a particularly dangerous precedent. It is based on simply refusing to recognize that there were 12 intervening pages of transcript which effected a significant change in the circumstances of the trial. A contempt conviction of a lawyer by a selective reading of the record is a dangerous threat to the bar.

In sustaining the foregoing specifications for contempt, the Seventh Circuit has affirmed convictions upon a theory that --

a) While disrespectful language is not contempt in the absence of actual obstruction, nevertheless if the court thinks the language too disrespectful, i.e., crossing some undefined boundary line, then actual obstruction may be established from the language itself.

b) An order, once made, must be considered unaltered by subsequent statements in the courtroom, regardless of the fact that the most reasonable interpretation of the record would make it

clear that any member of the bar would have considered the situation to have been changed by the subsequent facts.

The last contempt cases in which this Court ruled on proper standards of conduct for lawyers were In re McConnell and Holt v. Virginia, both supra. Since then criminal trials ranging from the Chicago to the Watergate conspiracy trials have generated much passion and emotion. It is obvious that the convictions of Mr. Kunstler in this case challenge this Court's view on the independence of the bar and the Constitutional right and duty of vigorous advocacy. This Court should accept the petition herein so as to reaffirm those principles as the bedrock of our adversary process.

II.

THE PETITION PRESENTS FOR REVIEW A DECISION OF THE SEVENTH CIRCUIT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS, AND DEALING WITH AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BUT SHOULD BE SETTLED BY THIS COURT, NAMELY, WHAT IS THE PROPER STANDARD OF "INTENT" IN A CONTEMPT PROSECUTION UNDER 18 U.S.C. SEC. 401.

The 1972 remand decision of the Circuit Court, which governed the trial before Judge Gignoux, included extensive consideration of the proper standard for the intent requirement of a contempt prosecution. The Seventh Circuit frankly recognized a conflict among the Circuits on this matter. Since this Court has never addressed the question of the proper definition of intent in the contempt

context, 28/ it seems particularly appropriate that this Court resolve the conflict among the Circuits on this issue.

The Seventh Circuit's 1972 decision in Dellinger incorporated its extended discussion of the intent issue in United States v. Seale, 461 F. 2d 345, 367-69, the companion case decided the same day.

There the Circuit Court, referring to the conflicting rulings of the different circuits, posed the following questions:

a) Was specific intent required in all contempt citations (as appeared to be required in earlier decisions of the Fifth and Seventh Circuits and in one decision of the District of Columbia Court of Appeals) 29/ or was it required only in cases of contempt not "clearly blameworthy" (as was expounded in another decision of the D.C. Circuit) 30/.

28/ But the Court has been very clear that "intent," however defined, is an element of the crime. In Panico v. United States, 375 U.S. 29 (1963), there was a reversal of a contempt conviction for a hearing on an alleged contemnor's "criminal" intent; and see Cooke v. United States, 267 U.S. 517, 538 (1925), "the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt." See also, In re Watts, 190 U.S. 1, 29 (1903).

29/ In re Brown, 454 F. 2d 999 (D.C. Cir., 1971); United States v. Jackson, 426 F. 2d 305 (5th Cir., 1970); United States v. Sopher, 347 F. 2d 415 (7th Cir., 1965).

30/ Offutt v. United States, 232 F. 2d 69 (D.C. Cir.), cert. den., 351 U.S. 988 (1956).

b) Assuming that a finding of specific intent is required, then as pointed out by the Seventh Circuit, the Circuits are further in conflict:

> "On this question, we also find a disparity of treatment. The poles of the intent issue are rather easily defined; at one extreme is the theory that all that is required is a willful or volitional act without regard to the known or intended consequences of the act, and at the other is the requirement that the contemnor actually intended his act to obstruct the judicial process... See Caldwell v. United States, 28 F. 2d 684 (9th Cir., 1928)."

The Seventh Circuit then proceeded to reject this Ninth Circuit formulation and opted for its own:

> "Intent is better defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." 461 F. 2d at 368.

We will argue before this Court that especially on the question of lawyer contempts such a standard is inconsistent with accepted doctrine that proven specific intent of the nature of a "vicious will," an "evil purpose or mental culpability" (Morissette v. United States, 342 U.S. 246, 251, 252) is required where the definition of a criminal offense is vague. 31/

As applied to alleged contempt of a lawyer charged with an offense based on advocacy, the standard which in essence is the "reasonable lawyer" standard is particularly inappropriate because it does not recognize the peculiarly individualistic

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31/ See, e.g., Screws v. United States, 325 U.S. 91, 101 (1945); Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925).

aspects of advocacy. Vigorous advocacy is the working premise of the adversary system. It is neither a matter of parlor niceties and classroom academics nor a matter of doing what every other lawyer does. A good trial lawyer is a fighter willing to butt his head with other trial participants on behalf of his client. And he may be a good trial lawyer precisely because he has the courage to be exceptional.

Of course he may not intentionally obstruct. But the definition of that intention is critical. For if an attorney could be held in contempt even where he has no wrongful intent, such a threat necessarily curtails a vigorous defense. Only the hardiest of men would press his case to the limits of his right to do so, if he were told that his conduct might be judged by what the "reasonable lawyer" does. The defendant's case would then be cautious, hesitant, and inadequate.

The Seventh Circuit recognizes the adversary role of lawyers when it says:

> "Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows." 461 F. 2d at 400.

But all of this is improperly limited by the statement that --

> "[A]n attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth." Ibid.

The result of the foregoing is that when Judge Gignoux tried the case and the Circuit Court

reviewed his judgment, Mr. Kunstler's intent was tested -- not by whether his protestations that he meant not to obstruct were believed -- but rather by what the reasonable lawyer would have done. See opinion of Judge Gignoux on motion for judgment of acquittal, Appendix, infra, 31a at 58a. We believe that even so tested, Mr. Kunstler's conduct should not have been found culpable. Even if the test is that of a "reasonable lawyer" acting in the "heat of controversy," Mr. Kunstler's conduct does not rise to the level of contempt. He did no more than did one of California's leading members of the bar when by a comment to the jury he insisted on protecting his client from a plainly prejudicial statement the judge made to the jury, Cooper v. Superior Court, 55 Cal. 2d 291, 10 Cal. Rptr. 842, 359 P. 2d 274 (1961). But we believe the issue of the proper definition of the standard is a question that must be determined before we deal with the application of the standard to the facts of this case.

We suggest that this issue is of singular importance to the bar. The absence of a clear guide from this Court has resulted in a division of the Circuits on an issue which cannot tolerate uncertainty. We have stated the position which we will assert if the Court should grant the petition. We believe that the social value of encouraging a vigorous and independent bar is inconsistent with the "reasonable lawyer" test. But if the Court should disagree, it should at least enunciate its view and not force the bar to struggle through the thicket of conflicting Circuit Court decisions.

III.

THE PETITION PRESENTS FOR REVIEW IMPORTANT QUESTIONS OF PROCEDURAL DUE PROCESS IN THE CONTEMPT CONTEXT: A) WHAT IS THE PROPER APPLICATION OF THE NOTICE REQUIREMENTS IN CONTEMPT PROCEEDINGS UNDER RULE 42(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, A QUESTION WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT; AND B) MAY A CONVICTION FOR CONTEMPT BE SUSTAINED ON A CHARGE NOT MADE, OR WHERE IT APPEARS THAT THE CONVICTION COULD HAVE BEEN BASED ON CLEARLY NON-OBSTRUCTIVE CONDUCT, A QUESTION WHICH THE CIRCUIT COURT HAS DECIDED IN THIS CASE IN A WAY PLAINLY IN CONFLICT WITH DECISIONS OF THIS COURT?

A.

Only last term the Court in Taylor v. Hayes, ___ U.S. ___, 94 S. Ct. 2697 (1974), held that "before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard." (Emphasis added.) Taylor was a summary proceeding.

Eaton v. Tulsa, 415 U.S. 697 (1974), was a hearing on notice. There the Court announced the application to contempt charges of the rule in Cole v. Arkansas, 333 U.S. 196 (1948), namely, that a conviction may not be sustained upon a charge not made.

The conviction of Mr. Kunstler was on notice pursuant to a proceeding under Rule 42(b) of the Federal Rules of Criminal Procedure. The charges against Mr. Kunstler as tried before Judge Gignoux

were exactly as framed by Judge Hoffman, as follows: 32/

> "After the Court ruled, on February 2, that the Reverend Abernathy would not be permitted to take the stand, the Court ordered that Mr. Kunstler and the other attorneys and defendants not mention the name of the Reverend Abernathy in front of the jury. Mr. Kunstler not only defiantly indicated that he fully intended to violate that order, but in the middle of the direct testimony of the witness Lynskey, Mr. Kunstler actually brought the Reverend Abernathy into the courtroom and made a statement to the jury and physically embraced the Reverend Abernathy in front of the jury. This flagrant violation of the Court's order is reported as follows..." (Emphasis supplied.) 33/

There never was an order that Mr. Kunstler may "not mention the name of the Reverend Abernathy in front of the jury." The order was that he not "make any reference in front of the jury that they wanted Doctor Abernathy to testify."

The difference is of enormous importance in evaluating the facts in this case. Mr. Kunstler did indeed mention the name of Dr. Abernathy before the jury (which he had not been prohibited from doing) but in the portion of the record which is claimed as contempt he did not "make any reference in front of the jury that they wanted Doctor

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32/ The government was given leave by the Circuit Court to rephrase the charges, but failed to do so.

33/ 370 F. Supp. at 1338; Appendix, infra, p. 73a.

Abernathy to testify." Instead, he made a motion before the court that it reconsider its ruling.

The problems of procedural due process are brushed aside by the Circuit by the statement:

> "Since the specification quotes Judge Hoffman's orders verbatim, there could be no doubt what Kunstler was charged with violating. Therefore we are not sustaining the trial court by treating the conviction as a conviction upon a charge not made." 502 F. 2d at 816; App. 8a.

But the charge by Judge Hoffman is explicit and is not supported by, but rather contradicted by, the transcript. And the Seventh Circuit misses the point when it says that "there could be no doubt of what Kunstler was charged with violating." Is there no doubt?

Was he charged with violating an order not to mention the name of the Reverend Abernathy? Where is the order?

Was he charged with violating an order not to make any reference in front of the jury that they wanted Dr. Abernathy to testify? If so, where is the charge and where in Judge Gignoux' findings is he convicted of that?

Was he charged with "violating the court's order not to renew his motion in the presence of the jury," which is the convicting language of Judge Gignoux, 370 F. Supp. 1320? If so, where is that charge and where is that order? Where was he charged with "continuing argument after the Judge's repeated directions to stop," ibid., an item of which he was convicted by Judge Gignoux?

These are not frivolous questions, as suggested by the Seventh Circuit. They rather address two points which are important in the use of the contempt process, especially against lawyers:

a) Lawyers are of course required to abide by orders of the court, but they are also supposed to

have acute ears and they are not required to over-read those orders and eschew conduct which they believe is required for a proper defense of their client. And if there is doubt, they are supposed to err on the side of their duty to their client. They must also be sensitive to the dynamics of a trial and if an order has been effectively nullified by the court's own action, they are supposed to be aware of that. A cavalier reading of the charges ignores the nuances which often make the difference between a creative and a routine lawyer.

b) The uncertainty of what charge was made against Mr. Kunstler is of course directly related to the failure of Judge Gignoux and the Seventh Circuit to deal with the omitted 12 pages. For it is from those omitted pages it becomes clear that Judge Hoffman by his own conduct had vitiated the only order that he did make, i.e., "not to make any reference in front of the jury that they wanted Doctor Abernathy to testify."

The Court should accept the petition to clarify the notice requirements of Rule 42(b). Here the charge is followed by a long quotation from the transcript which is inconsistent with the charge. Does the mere recitation of the transcript become the charge? That appears to be directly in conflict with this Court's holding in Eaton v. Tulsa, supra, that a statement of the evidence at the contempt trial can never modify the charge itself. Is the situation different because the charge is followed by a transcript of evidence to be admitted at the trial? The use of references to a transcript does not satisfy the certification requirements of Rule 42(a), cf., United States v. Marshall, 451 F. 2d 372 (9th Cir., 1971). Are the notice requirements of Rule 42(b) to be similarly treated?

This Court has not defined the notice requirements of Rule 42(b), an important question in the administration of that rule, and this case would present an opportunity for the Court to clarify the requirements of the rule.

B.

Judge Gignoux' convicting findings were that Mr. Kunstler "violated the court's order not to renew his motion in the presence of the jury," 370 F. Supp. 1320. Since the record is barren of such an order, a fact which was called to the attention of the District Court and the Seventh Circuit, the appellate court shifted the grounds of the conviction. The Seventh Circuit states that Mr. Kunstler's motion to the judge was a violation of Judge Hoffman's earlier order not to mention that he wanted Dr. Abernathy to testify. 502 F. 2d at 816; Appendix, infra, pp. 7a-8a.

Regardless of the inaccuracy of the Circuit's reading of the record, the convicting statement of Judge Gignoux cannot stand as a matter of procedural due process, since the charge was not made, Eaton v. Tulsa, supra; nor may a reformulation of the finding by the appellate court correct this failure of procedural due process, ibid.

One further deficiency in Judge Gignoux' finding should be noted. The trial judge carefully separated this entire matter into two parts. Part I is clearly an In re McConnell, supra, situation, i.e., non-obstructive conduct by a lawyer. Reading Judge Gignoux' finding leaves one in doubt as to the extent to which the facts under Part I entered into his findings of guilt. "Since the record fails to 'negate the possibility' ... that the conviction was based solely on ..." lawful conduct, the conviction cannot stand. Eaton v. Tulsa, supra, fn. 3.

In Taylor v. Hayes, supra, the Court reaffirmed the requirements of procedural due process in lawyer contempt cases. By ignoring important procedural protections, both the District Court and the Circuit have created a dangerous precedent in this field which will have the inevitable effect of curbing the kind of vigorous advocacy upon which our legal system depends. In re McConnell, supra.

IV.

THE PETITION PRESENTS FOR REVIEW THE IMPORTANT QUESTION AS TO THE UNEQUAL ADMINISTRATION OF THE LAW, NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER DEFENSE COUNSEL CAN CONSTITUTIONALLY BE CONVICTED OF CONTEMPT WHERE THE GOVERNMENT PROCEEDS ON THE THEORY THAT THE CONTEMPT PROCESS IS TO BE EMPLOYED ONLY AGAINST DEFENSE COUNSEL AND NOT AGAINST PROSECUTORS GUILTY OF THE SAME ACTS OF WHICH DEFENSE COUNSEL WERE CONVICTED.

The time is long since overdue to correct the inexcusable practice of lower courts in contempt prosecutions of prosecuting defense counsel but protecting government lawyers regardless of what they do. The recent study by the Association of the Bar of the City of New York, Disorder in the Court, supra, emphasized the fact that although--

> "Contempt is theoretically available against prosecutors ... contempt citations have in fact not been used for this purpose. Two thorough studies of cases going back at least twenty-five years have failed to uncover a single instance in which a prosecutor was punished for contemptuous courtroom behavior. Two cases were found in which trial courts held prosecutors in contempt for their courtroom statements, but both decisions were reversed on appeal. There are other cases in which appellate courts have suggested that a prosecutor should have been held in contempt, but these have customarily come to nothing." (p. 186.) 34/

34/ Since the preparation of that report, there is another case of a conviction of a prosecutor in a trial court, reversed on appeal. Weiss v. Burr, 484 F. 2d 973 (9th Cir., 1973).

Judge Jerome Frank in his opinion in United States v. Antonelli, 155 F. 2d 631, 661-2 (2d Cir. 1946), pointed out the price that is paid for the "ceremonious ... ritualistic verbal spanking" that is administered to misbehaving government attorneys while the court convicts their victims:

> "The practice ... breeds a deplorably cynical attitude towards the judiciary."

And Judge Frank continued:

> "If this court really meant business about such behavior as that of government counsel in the case at bar, if it actually considered such behavior reprehensible, it would, at a minimum, announce that if, in any future case any government lawyer should thus conduct himself, it would deprive him of the right to practice in this court and would recommend that he be removed from his office as a representative of our government." Ibid.

The case now before this Court is a classic example of the abuse complained of by the report of the Association of the Bar of the City of New York. Because of Judge Gignoux' assumption arguendo, we have a clear case where the prosecutors are guilty of the same contempts of which defense counsel was convicted. The class -- defense counsel -- was singled out for selective and discriminatory prosecution in violation of the fundamental Constitutional principles enunciated in Yick Wo v. Hopkins, 118 U.S. 356 (1886). Government counsel were not prosecuted because they were government counsel, not defense counsel. Defense counsel were prosecuted because they were defense counsel, not government counsel. This is invidious discrimination prohibited by Yick Wo.

Selectivity having been shown, the government

had the burden of justifying the discrimination. It did not even attempt to justify it. The government candidly admitted on the appeal to the Seventh Circuit that it applied different standards to defense counsel and prosecutors and does not believe that contempt need be used against prosecutors.

The notion that prosecutors may be deterred by reversal of convictions but defense counsel must be deterred by convicting them of crime, or perhaps disbarring them, is no excuse for prosecuting defense counsel and not prosecuting prosecutors. Indeed, it is the most candid confession of disparate treatment and discriminatory prosecution that we have ever read -- precisely the "unjustifiable standard for selectivity" forbidden by this Court in Yick Wo.

The Circuit Court, quoting Judge Gignoux, dealt with this as a question of burden of proof, placing on defendants the obligation of making "a satisfactory showing that the 'United States, on behalf of the [anti-riot act] court, has pursued the present prosecution for discriminatory and unconstitutional purposes.'" In re Dellinger, 502 F. 2d at 817.

But in this case Judge Gignoux "assumed arguendo" the discriminatory prosecution. The discriminatory purpose was admitted by the government when it asserted that it uses the contempt power only against defense lawyers.

We suggest that the selectivity practiced here is especially egregious because a) the invidious discrimination is in favor of government officials, thus putting in issue the entire question of respect for the law by its enforcers, and b) since the proceeding is one of contempt, it is being prosecuted in the name and on behalf of the court.

Any effort by the judicial branch of the government to use the contempt process to control lawyer conduct must necessarily fail to gain the confidence

of the bar and the public if it is one-sided. In view of the notoriety of this case, the recorded misconduct of government counsel, and the frank admission by the government that it proceeds only against defense counsel, it is particularly important that the Court accept this petition and address the issue of discriminatory prosecution.

V.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION NOT HERETOFORE DETERMINED, NAMELY, WHETHER A CONTEMPT IS GOVERNED BY THE RULE OF ALDERMAN v. UNITED STATES, REQUIRING DISCLOSURE OF UNLAWFUL ELECTRONIC SURVEILLANCE TO A DEFENDANT HAVING STANDING AND DENYING TO A COURT THE POWER TO MAKE EX PARTE DETERMINATION OF RELEVANCE AFTER IN CAMERA INSPECTION.

Electronic surveillance issues have plagued the "celebrated" Chicago conspiracy case from the beginning. It was in this case that former Attorney General John Mitchell first enunciated his claim of executive power to override the Fourth Amendment and revealed the existence of a massive electronic surveillance program. It took three years before the Supreme Court in United States v. United States District Court, 407 U.S. 297 (1972), rejected his contentions and declared the entire program illegal.

A.

The opinion of the Seventh Circuit is written as if this Court had never issued its opinion in Alderman v. United States, 394 U.S. 165 (1969), unsuccessfully sought to be modified by the government in United States District Court, supra, 407 U.S. at 324, n. 21.

Alderman unequivocally states that in a criminal prosecution a defendant who has standing may require the disclosure to him of unlawful electronic surveillance and that the trial court shall not engage in the process of in camera inspection of unlawful material for the purpose of determining relevance. In this case, standing and illegality were conceded; therefore, there was nothing left, under Alderman, but to turn over the logs and hold a taint hearing.

Despite Alderman's clear prohibition of in camera inspection, Judge Gignoux made numerous in camera inspections, as did the Circuit Court. These inspections are referred to by the Circuit Court, 502 F. 2d at 818-19, Appendix, infra, pp. 16a-22a. The point relied upon by Judge Gignoux and seemingly adopted by the Circuit Court is that Alderman does not apply because the basis of the proceeding here was what transpired at the trial, and the Circuit Court, after inspecting the wiretaps in camera, concluded "in no sense can the transcript of that trial be considered the fruit of any illegal surveillance." 502 F. 2d at 819, Appendix, infra, p. 22a.

But petitioners argued that the entire proceedings at the trial included "baiting" alleged contempts and that these episodes were the "fruit" of unlawful surveillance. Alderman forbids the court from making an ex parte determination of this issue. Neither Judge Gignoux nor the Circuit Court can appraise ex parte:

> "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life."
> Alderman, supra, 394 U.S. at 182.

Despite Alderman, both Judge Gignoux and the Circuit Court placed the burden on the defendants to rebut the government's argument that "the Government's evidence could not have been derived from the overhearings" (502 F. 2d at 819, Appendix, infra, p. 19a). It is a remarkable tour de force to insist that a litigant, who has been denied access to material, blindly rebut an argument that it is not relevant. In Alderman, this Court expressly rejected that hopeless method and required the government to disclose the material to the defendants to enable them to meet the government's arguments. Alderman requires that reliance be placed on the adversary process instead of on the government's in camera disclosures. 35/ Here the lower courts simply failed to follow Alderman.

B.

Non-adversary proceedings may well permit a court to be misled because it does not have the benefit of the input of opposing counsel. Nothing reveals that more clearly than the Circuit Court's opinion. The following is stated at 502 F. 2d at 818, Appendix, infra, p. 17a:

> "The Government turned over to Judge Gignoux for his in camera inspection logs of all overhearings requested by defendants' disclosure motion."

That simply is not the fact, as the Circuit Court

35/ Indeed, the only explicable difference between the Circuit's decision in Seale and in the instant case is that upon in camera inspection it determined in the former case that the surveillance was "arguably relevant," and here it was not, precisely the determination which Alderman prohibits the court from making with an adversary hearing.

would have recognized had the Alderman adversary process been followed.

Petitioners sought disclosure of electronic surveillance of themselves, their counsel and their staff of legal assistants, whose names and addresses were all set forth in the motion. The government did not turn over to Judge Gignoux "all overhearings requested by defendants' disclosure motion." It says it turned over electronic surveillance of defendants and their counsel of record; but not the defense staff, who were the critical people who staffed the defense office, and other attorneys who played important roles but were not of record. 36/ Through the non-adversary process

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36/ Because of a disclosure made by the government in another case (Kinoy v. Mitchell, S.D.N.Y. Civ. Action No. 5698/70), we know that Arthur Kinoy, a defense counsel not of record, was subjected to electronic surveillance at least 23 times, most of which were concededly unlawful (the government is still claiming that nine overhearings of Mr. Kinoy were lawful because they allegedly involved foreign surveillance). Some of these overhearings occurred after the indictment and shortly before the Chicago trial when Mr. Kinoy was engaged actively in discussion of trial strategy.

We do not know the relevance of these overhearings to this case (because we still do not have the transcripts of the overhearings), but we do know that they were not turned over in this case even for in camera inspection, which means that, contrary to Alderman, somebody in the Department of Justice is preempting the responsibility of determining relevance. But Mr. Kinoy was only one of a number of consulting attorneys not of record as to whom demand was made for wiretaps. Additionally, disclosure was demanded for the 25

the Circuit Court overlooked this point, and made a serious error.

It also unwittingly adopted the language of Mr. Mitchell's order of July 14, 1969, without considering its defects. The Circuit Court's opinion says (502 F. 2d at 818): "[T]he surveillances were cut off in accordance with the July 14, 1969, instructions of the Attorney General."

The Circuit Court has simply fallen into the government's deliberately phrased trap about the former Attorney General's instructions. A careful reading of the Mitchell memorandum shows that in fact it required a continuance of the electronic surveillance program, which the Mitchell memorandum itself acknowledges made surveillance of at least the defendants and their attorneys likely, if not inevitable. The memorandum required discontinuance only as to specific persons, to wit, the eight defendants and their counsel of record. It specifically required all other existing electronic surveillance, including such as may have been ongoing with respect to the defense staff and office, and other attorneys, to be continued. Further, to the extent it directed discontinuance, it did so only after one of the parties to the conversation was identified by the agent as one of the specified individuals. Thus, even were Mitchell's directive followed to the extent of the limited discontinuance prescribed, it is clear that a reasonable, if not considerable, likelihood exists that overhearings occurred of members of the legal staff and counsel other than those of record; that overhearings

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legal workers who staffed the defense office and did investigation for the defense attorneys. How many additional overhearings occurred which may or may not be relevant will never be known without disclosure and any adversary hearing.

occurred of the specified defendants and their counsel in conversations in which they did not, or until they did, identify themselves to a party; and that overhearings of conversations of other persons occurred which had as their goal or result the acquisition of knowledge concerning defense personnel and/or strategy. Thus the government's response is far from the specific denial required by this Court in Gelbard v. United States, 408 U.S. 41 (1972).

It was not even contended that the defendants would not have standing to obtain unlawful electronic surveillance of their legal staff and attorneys not of record, under the most elementary Sixth Amendment principles. Yet the entire process of accepting the government's ambiguous and unresponsive denials, of taking in camera whatever the government submits, and making its own ex parte evaluation of what the government provides without allowing adversary comment thereon, allowed all of the more subtle nuances of surveillance to fall by the wayside and led the Circuit Court into the kind of erroneous statements that it made in its opinion.

It is particularly important that the Court accept this petition and address the issues of electronic surveillance which are presented.

VI.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER AS A MATTER OF PUBLIC POLICY THE CONTEMPT POWER IS AVAILABLE TO PUNISH THE TARGETS OF JUDICIAL AND PROSECUTORIAL MISCONDUCT WHICH WAS OF SUCH AN EXTRAORDINARY AND PERVASIVE NATURE AS TO CAUSE A BREAKDOWN OF THE JUDICIAL PROCESS.

It is settled law that provocation is no defense to

contempt, Illinois v. Allen, 397 U.S. 337 (1970), and petitioners do not contend for a contrary rule.

But the question remains whether that rule governs this case or whether the facts in this case are so extreme as to bring into play other objectives of the judicial system which would limit the universal application of such a rule.

Every review of the contempt power has emphasized that, "in view of the heightened potential for abuse posed by the contempt power," Taylor v. Hayes, supra, 41 L. Ed. 2d at 908, "the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper," Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 451 (1911). The absence of all the safeguards accompanying an ordinary criminal case underscores the need to regulate carefully the use of the contempt power. Offutt v. United States, 348 U.S. 11, 14 (1959); see also, In re Michael, 326 U.S. 224, 227 (1945); Nye v. United States, 313 U.S. 33, 49 (1941).

And what is the function of the contempt power that has justified departure from the normal process of criminal trials provided for under the Constitution? It is only "that the necessities of the administration of justice require such summary dealing with obstruction to it," Offutt, supra, 348 U.S. at 14. That, of course, is why the courts have insisted that in order for conduct to be contempt it must be not merely misbehavior but must amount to an "actual obstruction of justice," In re McConnell, supra. In other words, the contempt power is not a power to punish behavior unless it results in obstruction of a judicial proceeding and when it is "the least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat. 204, 231 (1821).

It is precisely because the contempt is so threatening that the proceedings which are to be protected

by its exercise from obstruction must essentially have those characteristics which merit the employment of this extraordinary power.

The Seventh Circuit in Seale said that errors by the trial judge do not excuse contempt (461 F. 2d at 362) and in Dellinger that "impropriety on the part of the trial judge cannot justify or excuse contemptuous conduct" (461 F. 2d at 401).

It is obvious from his opinions that Judge Gignoux read the foregoing comments as placing a straitjacket upon him so that, without regard to the extraordinary findings that he made as to the breakdown of the judicial proceeding, and from which he concluded that punishment was inappropriate, he nevertheless was required to find guilt.

Petitioners, as stated above, do not contend for a rule of law that error or even impropriety by a trial judge excuses contemptuous and obstructive conduct by a defendant or counsel.

We do, however, contend that when misconduct by a trial judge and a prosecutor has become so pervasive that it can no longer be said that the trial constitutes "a functioning of our judicial system," Bloom v. Illinois, 391 U.S. 194, 207 (1968), then the contempt process is no longer available for the reason that the very basis for the existence of this extraordinary power has evaporated. Moreover, to employ the contempt process in such a situation, considering the recognized dangers of its use, serves only further to undermine the public's confidence in the integrity of the judicial system. To use the contempt power under those circumstances makes clear that it is not the administration of justice that is being protected; it is rather the personality of a judge that is being assuaged and the result is to "engender resentment, suspicion, and contempt" for the courts, Bridges v. California, 314 U.S. 252, 271 (1941).

We readily acknowledge that in some cases it

might be difficult to draw a line between the application of the rule that simple provocation does not excuse contempt and the rule which we submit applies in this case. But the unusual and, we submit, unique status of the record in this case eliminates any such difficulty.

The Seventh Circuit's conclusion that "the demeanor of the judge and prosecutors would require a reversal if other errors did not," 472 F. 2d at 391, followed a massive documentation which established judicial impropriety, bias, and "contempt for the defense," as well as equally egregious conduct by the prosecutor.

Judge Gignoux at the conclusion of four weeks of testimony in which he heard from persons whose testimony was in no way reflected in the prior record (e.g., Charles Garry and Bobby G. Seale), independent observations by distinguished lawyers, jurists, and newspaper reporters, and selected tapes of what had actually occurred before Judge Hoffman, arrived at the conclusion that the record before him "amply support[s] these findings by the Court of Appeals," 370 F. Supp. at 1321.

Several important points, however, emerge from Judge Gignoux' opinion which add to the dimensions of this matter as delineated in the Seventh Circuit's opinion in the substantive case, 472 F. 2d 340.

a) The pervasiveness of the misconduct by the trial judge and prosecutors was largely indicated in the substantive opinion.

b) The actual breakdown of the judicial process was recounted by Judge Gignoux when he said that "on a number of occasions the trial so completely disintegrated that it could not be said that a judicial proceeding was in progress," 370 F. Supp. at 1321. And see his statements with respect to October 30, 1969 and February 4, 1970, id. at 1311 and 1312. He

further found that the defendants were not responsible for the breakdown, ibid. In those specific situations he concluded that no conduct of the defendants was punishable as contempt because no judicial proceeding was underway.

c) The causal impact of Judge Hoffman's conduct on the charges of which appellants were convicted was found as a fact by Judge Gignoux. He held that, with the exception of the two judicial robes charges, petitioners' conduct could "in each instance reasonably be said to have been in response, albeit an excessive response, to peremptory action of the judge" (370 F. Supp. at 1321; emphasis added).

Faced with the implication of his findings --pervasive misconduct of judge and prosecutors, causing a breakdown of the judicial process --Judge Gignoux felt that he could satisfy the imperatives of justice by separating out particular occasions when the trial obviously broke down and entering acquittals as to incidents occurring at those specific occasions, while adjudicating conviction without punishment as to the remainder. He saw that as the only way of adhering to a rule of "provocation is no defense" while at the same time paying heed to what the record here revealed as to the breakdown of the process. The difficulty with Judge Gignoux' approach is that he did not recognize that on the basis of his own findings the entire case was so infected by prosecutorial and judicial misconduct that there was no judicial proceeding during the entire trial upon which a conviction for contempt could be sustained.

Judge Gignoux' method of handling the incidents of the other days --conviction without punishment-- postulates a gap between "law" and "justice." Such a gap, bad in any field of law, is self-destructive in the field of contempt of court because it inevitably

raises the question whether the contempt power was allowed to be employed not for the purpose of vindicating the judicial process but rather to convict "for the record" victims of an abuse of that process.

There are alternate approaches within the recognized body of the law of contempt to which the lower court could have turned to reach the just result. Plainly, judicial misconduct may reach such a level that it cannot be said that parties responding thereto have the intent necessary for criminal contempt; or, since obstruction is an essential element of the crime, it is clear that the trial was obstructed not by the petitioners, but by the judge and prosecutor. Heretofore, courts faced with sufficient judicial misconduct have found no difficulty in reversing contempt convictions on either of the foregoing analyses. See, Schlesinger v. Musmanno, 367 Pa. 476, 81 A. 2d 316 (1951); People v. Pearson, 240 N. E. 2d 337 (Ill. App., 1968); In re Abse, 251 A. 2d 655 (D. C. Ct. of App., 1969).

We doubt that there will ever be a trial where the circumstances calling for acquittal on the grounds of prosecutorial and judicial misconduct are stronger than here. The "least possible power adequate to protect the end proposed" (Anderson v. Dunn, supra) in this case is no power.

In Offutt, supra, 348 U.S. at 14, this Court spoke of the "extraordinary power" of contempt as necessary to vindicate the "majesty of the law." We submit that the "majesty of the law" prohibits a ruling that the contempt power is available so that the malefactors may penalize their victims.

There are occasions where "the conduct of law enforcement officials is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction," United States v. Russell, 411 U.S. 423, 431-32, per Rhenquist, J. This is such a case, and the law enforcement officials were the judge and prosecutor.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgment and opinion of the court below.

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December 6, 1974.

Respectfully submitted,

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